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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

No. 80-6519

MAJOR HENRY JOHNSON, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Upon A Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on January 16, 1981, not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia is a published Opinion reported as Johnson v. Commonwealth, ____ Va. ____, 273 S.E.2d 784 (1981). A copy of the Opinion is attached to the Petition for a Writ of Certiorari at A16 through A25. The final Order of the Supreme Court of Virginia on the appeal was entered on January 16, 1981. A copy of that Order is not attached to the aforesaid Petition but is included at the end of this brief.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Should the untimely petition for a Writ of Certiorari be considered?

2. Did the Virginia Supreme Court err in holding that the protection against double jeopardy was not violated when the jury at the first trial found the petitioner guilty of capital murder during a robbery but, as instructed by the Court at the request of the defense to avoid possible multiplicity of convictions and sentences, returned a finding of "not guilty" of the robbery?

3. Should petitioner's confession have been suppressed on the ground that it was rendered to the police after he had been appointed a lawyer at his request upon arraignment in the police court the day after his arrest?

4. Is this case worthy of review by this Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition at pages 2 through 2A. Rule 20.1 of the Rules of the Supreme Court of the United States says as follows:

> A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

Rule 29.2 provides that:

> Whenever any Justice of this Court or the Clerk is empowered by law or under any provision of these Rules to extend the time for filing any document or paper, an application seeking such extension must be presented to the Clerk within the period sought to be extended. However, an application for extension of time to docket an appeal or to file a petition for certiorari shall be submitted at least 10 days before the specified final filing date and will not be granted, except in the most extraordinary circumstances, if filed less than 10 days before that date.

STATEMENT OF THE CASE

The petitioner was arrested in Roanoke, Virginia, on December 12, 1977. At his 9:00 a.m. arraignment on December 13, pleading indigency, he asked the general district court (police court) to appoint counsel for him. The request was granted and the petitioner was returned to the Roanoke City Jail. (Orig. trial tr. 10-11, 26.) At 2:18 p.m. on that same day, Detective James C. Clingenpeel of the Roanoke City Police Department initiated an interview with petitioner at the jail. (Orig. trial tr. 14.) Clingenpeel advised him of his rights (orig. trial tr. 14, 16-17.), according to Miranda v. Arizona, 384 U.S. 436 (1966), using a "rights card" which provided, in part:

> 3. You have the right to talk to a lawyer right now and have him present during the entire time you are being questioned.
>
> 4. If you cannot afford to hire a lawyer, one will be furnished to represent you before any questioning.
>
> 5. If you desire to answer my questions without a lawyer, you may do so, but you may stop at any time you should desire.

The petitioner indicated that he understood the statements and signed the card in the space provided. (Orig. trial tr. 17.) He then orally gave an inculpatory statement which was not recorded and which was completed at 3:10 p.m. (Orig. trial tr. 18-23.) Clingenpeel, who testified at an April 1978

suppression hearing, stated that he immediately returned to his office and reduced his recollection of the confession to writing. The petitioner did not thereafter examine or sign the officer's memorandum. (Orig. trial tr. 18,21.)

At the suppression hearing, Clingenpeel stated that, at the time of the interview, he did not know whether the petitioner had been arraigned, or whether counsel had been appointed. (Orig. trial tr. 14.) He testified that he made no attempt to ascertain if counsel had been, in fact, appointed and did not try to notify counsel of the interview. (Orig. trial tr. 14.) The petitioner was first informed of the identity of his court-appointed counsel on December 14 and first saw the attorney on that day. (Orig. trial tr. 27.) The record does not reveal when counsel learned of the appointment.

On petitioner's first appeal the Supreme Court of Virginia upheld the admissibility of the confession. Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979). At his retrial following reversal on other grounds, petitioner renewed his objection. (2nd trial tr. 270-271.) On appeal from his conviction at his retrial, he asked the Virginia Supreme Court to reconsider its prior holding, but a writ of error was refused on that issue on July 15,

1980. (See Appendix A15.) Final judgment on the second appeal (including that denial of a writ of error) was entered on January 16, 1981.

The petitioner was originally tried in Roanoke under a three-count indictment charging him (1) with the robbery of John N. Gardner of United States currency, (2) with the felonious killing and murdering of John N. Gardner while committing robbery while armed with a deadly weapon, and (3) with using a pistol while committing murder. At the conclusion of the evidence, the trial court, without objection and at the request of the petitioner, granted an instruction which stated that "if, under Count II [capital murder] of the indictment, you find the defendant guilty of capital murder, then you must find him not guilty under Count I [robbery] of the indictment." The court, without objection, also granted an instruction which in pertinent part told the jury that "if you find the defendant guilty of capital murder, then you must find the defendant not guilty of robbery, inasmuch as the elements of robbery are integral parts of the elements of the offense of capital murder in this case." The jury was told that capital murder is the "wilful, deliberate and premeditated killing of any person while in the commission of robbery while armed with a deadly weapon" and further that the jury must

find beyond a reasonable doubt that "at the time of any such killing the defendant was committing robbery while armed with a deadly weapon" in order to convict for capital murder.

The record of petitioner's first trial discloses that the jury initially returned a verdict finding him guilty of capital murder under Count II of the indictment. The court then instructed the jury to return to the jury room for a further consideration of Counts I and III. Thereafter, the jury returned its verdicts finding the petitioner guilty of capital murder, guilty of using a pistol in the commission of murder, and not guilty of robbery. The trial being bifurcated, the jury then considered the issue of punishment and returned its unanimous verdict fixing his punishment at death. The verdict was subsequently approved and affirmed by the trial court. The order of the trial court recites that "[i]n view of the fact that robbery is an integral part of Capital Murder, it is Ordered that Robbery, Count I ... be dismissed." The petitioner voiced no objection to the form of the orders entered by the count.

The petitioner appealed his capital murder conviction, seeking a new trial. At that time he raised no issues of double jeopardy, collateral estoppel, autrefois acquit, or inconsistent verdicts. His conviction for capital murder was reversed by the Virginia Supreme Court and the case

remanded for retrial because of error in the form of the instructions as compounded by improper argument of the prosecutors. That is, the jury was not instructed that to convict the petitioner of capital murder, it must have found that he was "the triggerman," and the prosecution made incorrect argument to the jury on this point. Following a remand of the case, and on motion of the petitioner, a change of venue was granted to the Circuit Court of the City of Alexandria.

Prior to his second trial, the petitioner sought to have the trial court dismiss or reform the capital murder indictment, alleging grounds of double jeopardy, collateral estoppel, and autrefois acquit. Specifically, petitioner contended there, and argued on his appeal, that since he was "acquitted" of robbery at the first trial he could not be tried for capital murder because the elements of an armed robbery are integral to a conviction of murder in the commission of armed robbery. The trial court overruled his motion, and upon a retrial the jury convicted the defendant of capital murder. Because the jury was unable to agree on the imposition of the death penalty, he was sentenced by the trial court in accordance with Virginia law to life imprisonment.

The facts relating to the offenses were generally that on December 9, 1977, John Gardner of Roanoke was shot and

killed, and at the same time money and property were taken from his person and office. The petitioner and his brother, David A. Johnson, were the perpetrators of this crime. There were no eyewitnesses to the murder and robbery other than the two Johnson brothers. The prosecution of the case was not without difficulty and to meet the exigencies of proof the Commonwealth's Attorney framed one three-count indictment charging the petitioner with capital murder, robbery, and the use of a pistol while committing murder.

ARGUMENT

I.

THE PETITION FOR A WRIT OF CERTIORARI IS UNTIMELY FILED AND SHOULD NOT BE CONSIDERED.

A petition for a Writ of Certiorari must be filed within 60 days of the entry of the judgment to be reviewed. Rule 20.1 of the Rules of the Supreme Court of the United States. An extension of time not exceeding 30 days may be granted "for good cause shown." Rule 20.1. In the case at bar the petition was not filed within the 60-day period but rather 90 days after the judgment of the Virginia Supreme

Court.[1]

Rule 29.2 provides that an application for an extension of time to file a petition for a Writ of Certiorari shall be submitted at least 10 days before the specified final filing date, and such application filed less than 10 days before that date will not be granted "except in the most extraordinary circumstances." In this case the application for an extension was not filed within 10 days of either the 60-day period or the 30-day possible extension.[2]

The petitioner candidly concedes in his extension application that he has "no excuse whatsoever" for failing to file in timely fashion, although he does set forth his error of computing the time under the former rule. The respondent respectfully submits that even if the extension application had been filed before expiration of the entire 60-day period and before the final 10-day period, petitioner has failed to establish "most extraordinary circumstances" to justify a belated filing.

Accordingly, the petition should not be considered.

---

[1] The petition was filed on April 16, 1981. The final judgment of the Supreme Court of Virginia was entered on January 16, 1981.

[2] An application for an extension was mailed to the Court, according to the certificate of service, on April 11, 1981.

II.

THE VIRGINIA SUPREME COURT DID NOT ERR IN HOLDING THAT THE PROTECTION AGAINST DOUBLE JEOPARDY WAS NOT VIOLATED WHEN THE JURY AT THE FIRST TRIAL FOUND THE PETITIONER GUILTY OF CAPITAL MURDER DURING A ROBBERY BUT, AS INSTRUCTED BY THE COURT AT DEFENSE REQUEST TO AVOID POSSIBLE MULTIPLICITY OF CONVICTIONS AND SENTENCES, RETURNED A FINDING OF "NOT GUILTY" OF THE ROBBERY.

It is perfectly clear that the only reason the jury returned a "not guilty" verdict on the robbery, but a finding of guilt on capital murder during commission of that robbery, was because of the instruction directing them to do so. The petitioner never complained about inconsistent verdicts, and, of course, he was one of the architects of the inconsistency (which only appears to be an inconsistency from an examination of the findings in isolation). The instruction was granted at the request of both sides to avoid what was perceived (albeit incorrectly) as a multiplicity of convictions and punishments.

It is well-settled that consistency of verdicts is not required. Dunn v. United States, 284 U.S. 390, 394 (1932). Certainly this general rule would be applicable here where the reason for the inconsistency is so understandable and apparent. See United States v. Reginelli, 133 F.2d 595, 597 (3rd Cir. 1943). Where there is an inconsistent verdict in a multi-count trial, it should be treated as inconsistent verdicts are treated and not as raising a question

under the Double Jeopardy Clause. See United States v. Greene, 497 F.2d 1068, 1085-1086 (7th Cir. 1974), cert. denied, 420 U.S. 909 (1975).

Contrary to the suggestion of petitioner (Petition at 8), the Virginia Supreme Court did not concede that robbery is a lesser-included offense of capital murder or that one could not properly be convicted of both under Virginia law. The Court merely noted that if the petitioner had been convicted and sentenced for both, then he would raise an "issue" of double jeopardy for the Court to address. (See Appendix A20.) In fact, the Virginia Supreme Court has recently affirmed convictions and separate sentences for both capital murder and the underlying felony - although not in the double jeopardy context. E.g. Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980). Thus, double jeopardy would not be violated by convictions and sentences on both offenses, because Virginia law authorizes imposition of cumulative punishment. The legislative intent controls. Whalen v. United States, 445 U.S. 684 (1980). The petitioner states that his premise that robbery is a lesser-included offense of capital murder under Virginia law is "[f]undamental to [his] position" (See Petition at 7), but this premise is false.

As the Virginia Supreme Court pointed out below, this Court recently noted in United States v. DiFrancesco, 101 S.Ct. 328 (1980), that the double jeopardy provision is designed to serve "as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and to the possibility that he may be found guilty even though innocent." The Court below also correctly pointed out that none of these considerations are applicable in the case at bar. (See Appendix A22.)

In the instant case - as the Virginia Supreme Court stresses in its Opinion - the jury found that "all of the elements necessary to convict of first degree murder and of robbery had been established and therefore the commission of capital murder was proved." (See A24) The Court also said:

> The jury was specifically instructed that it could not find the defendant guilty of both capital murder and robbery. The jury was also instructed that for it to convict Johnson of capital murder, it had to find that his killing of the victim was not only willful, deliberate, and premeditated but occurred during the course of defendant's armed robbery of the victim.
>
> While the trial court properly may have followed some other course of action in the first trial, we find no prejudice to the defendant in the course it did follow. This court would

> stultify itself to hold that the jury in this case made a factual finding that Johnson was innocent of robbery. We would have to find that it ignored the court's instruction and that its finding of not guilty under Count I was completely unrelated to the express direction it had received from the court to return such a verdict if it found defendant guilty of capital murder.
>
> [T]he defendant asked for the instruction which prompted the jury's verdict on the robbery count. He therefore, aided by the Commonwealth's Attorney and the trial judge, successfully obtained a termination of his prosecution on the robbery count without any determination of his factual guilt or innocence under this count. On the contrary, the jury was directed to return the verdict it did because it, in fact, had found that defendant was guilty of committing an armed robbery (during which he also committed murder). Or, stating this anomalous situation differently, the "not guilty" verdict solicited by the defendant and the prosecution, and directed by the court, was predicated upon an affirmative factual finding by the jury that the defendant was guilty of robbery. Surely the double jeopardy clause, designed to protect against government oppression, does not apply under such circumstances. (Appendix A21-22.)

Petitioner relies heavily on Fong Foo v. United States, 369 U.S. 141 (1962), a case which he never cited in the Virginia Supreme Court and which is clearly distinguishable. In that case a United States District Court directed an acquittal on the charges being tried based upon one or both of two grounds: (1) supposed improper conduct of the prosecutor and (2) supposed lack of credibility of the prosecution witnesses. The government sought and obtained mandamus by contending to the Court of Appeals that the

district judge exceeded his power by directing the acquittal. Ultimately this Court reversed and held that the entry of final judgment of acquittal barred retrial - even if the judge exceeded his authority by directing the acquittal.

Of course, the Commonwealth does not maintain that petitioner could be retried on the robbery charge upon which he was formally found not guilty. The question in this case involves the validity of the murder conviction rendered at the unitary trial, and Fong Foo sheds no doubt upon its validity.

III

PETITIONER'S CONFESSION SHOULD NOT HAVE BEEN SUPPRESSED ON THE GROUND THAT IT WAS OBTAINED BY POLICE AFTER PETITIONER HAD BEEN APPOINTED AN ATTORNEY UPON ARRAIGNMENT IN THE POLICE COURT.

In Edwards v. Arizona, 49 U.S.L.W. 4496 (decided May 18, 1981), this Court held that where a defendant at interrogation invokes his right to consult with counsel before any further interrogation, he may not be questioned further until counsel is made available - unless the accused initiates further conversation. This Court said:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further

> hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.
> (Emphasis added.)

The petitioner would extend the point of Edwards to the extreme that merely because at arraignment in the police court a defendant indicates his desire for appointed counsel in the case due to his indigency, and counsel is appointed, this automatically - without more - precludes interrogation initiated by the police. At no time in the case at bar did the petitioner indicate that he wanted to deal with the police only through counsel. Instead, as concluded by the trial judge and Supreme Court of Virginia, he knowingly, intelligently and voluntarily waived his right to counsel at the interrogation before there was any questioning; and there was never any attempt to persuade him to waive his right to counsel.

IV

THIS CASE IS NOT WORTHY OF REVIEW BY THIS COURT.

A review on Writ of Certiorari is not a matter of right,

but of judicial discretion, and will be "granted only when there are special and important reasons therefor." Rule 17.1 of the Rules of the Supreme Court of the United States. As to the confession issue in the case at bar, it would be premature at best to grant review on the heels of Edwards v. Arizona without allowing time for lower courts to interpret and apply it.

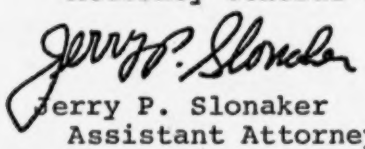
In regard to the double jeopardy issue, the Commonwealth submits that the facts of the instant case are very unusual. The case is unique and a procedural oddity of no real national or even local importance.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 16th *day of* January, 1981.

Major Henry Johnson, Jr., Appellant,

against Record No. 800372
Circuit Court No. F-50691

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Alexandria on the 7th day of November, 1979.

For reasons stated in writing and filed with the record, the court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages and the costs expended herein.

It is ordered that the said circuit court allow counsel for the appellant a fee of $550 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

The Commonwealth shall recover of the appellant the amount paid court-appointed counsel to represent him in this proceeding, counsel's costs and necessary direct out-of-pocket expenses, and the fees and costs to be assessed by the clerk of this court and the clerk of the court below.

This order shall be forthwith certified to the said circuit court.

A Copy,

Teste:

Appellee's costs: